Supreme Court, U.S.
FILED
AUG 30 1996
CLERK

No. 95-7452

IN THE

Supreme Court of the United States

October Term, 1996

KENNETH LYNCE,

Petitioner,

v.

HAMILTON MATHIS, ROBERT A. BUTTERWORTH,
AND HARRY K. SINGLETARY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE ON THE MERITS IN SUPPORT OF RESPONDENT

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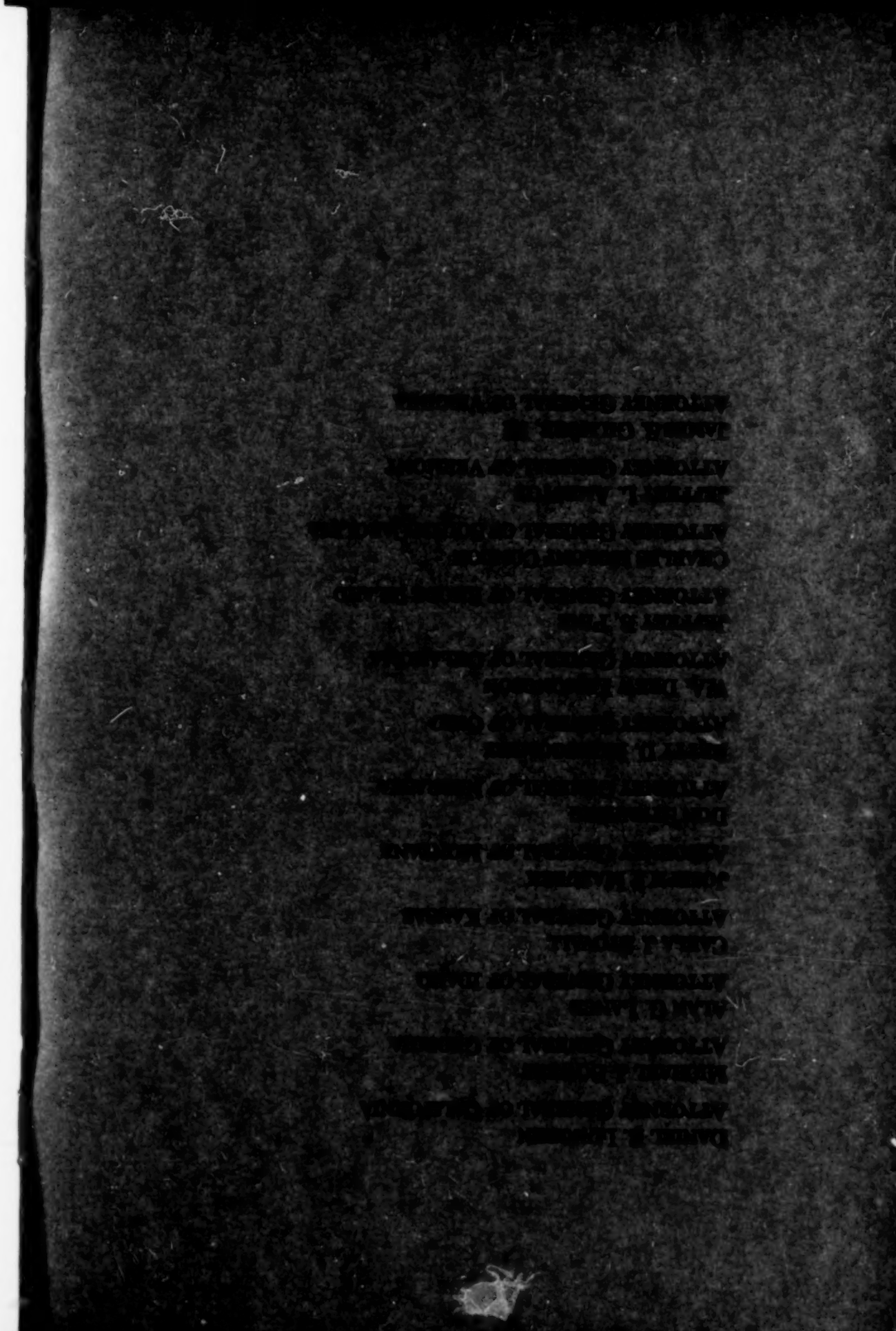

QUESTION PRESENTED

During the years 1988–1993, provisional credits, a form of "gain time" intended solely to relieve prison overcrowding, was awarded to Florida inmates. Between 1988 and 1991, the petitioner was given 1,860 days of provisional credits. Then in 1992, the Florida Legislature amended the provisional credits statute to exclude from eligibility a class of more violent offenders, including Petitioner. The question presented is whether that amendment violated the ex post facto clause of the U.S. Constitution.

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INTEREST OF AMICUS CURIAE

Numerous states across the country have adopted various mechanisms to provide some relief to their prison overcrowding problems. These efforts have met with varying results through use of these mechanisms—some mechanisms have resulted in loss of innocent life by violent offenders released too early. These losses have resulted in further amendments to the prison overcrowding mechanisms. Many of these amendments, such as that to Florida's provisional credit statute, have been met with *ex post facto* challenges. The States joined herein as amicus curiae urge this Court to follow the "purpose and effect" analysis of *Morales* when reviewing these prison overcrowding mechanisms. Review of these amendments to early release mechanisms should recognize the states' legitimate penological interest in controlling prison

overcrowding while protecting the security of its citizens. Accordingly, the amici states would further urge this court to revisit the line of "early release" cases including *Weaver v. Graham*, and to consider these cases under a test which would give deference to the states power to control prison overcrowding.

SUMMARY OF ARGUMENT

This case involves amendment of a remedial statute which was adopted by the legislature to provide the Department of Corrections with an emergency mechanism which could be utilized by the Department, with the approval of the Governor, to reduce prison overcrowding in times when the other mechanisms were unsuccessful in reducing the prison population to the federally mandated level. Petitioner challenges this statute as violative of the *ex post facto* clause. The amici states would submit that the Florida provision does not alter the definition of criminal conduct or increase the penalty by which a crime is punishable so as to violate the *ex post facto* clause. The provisional credit statute is a remedial statute aimed at controlling prison overcrowding and the award of such credits in no sense is tied to any aspect of the original sentence and cannot possibly be a factor at sentencing or in deciding to enter a plea bargain and creates only the most speculative and attenuated risk of increasing the measure of punishment attached to the covered crimes.

The provisional credits at issue in the instant case is distinguishable from the gain time at issue in *Weaver v. Graham*. Unlike the gain time in *Weaver,* the award of provisional credits is not mandatory and the inmate, at the time he creates his crime or is sentenced, has no right to or expectation of such an award of provisional credits. The award of provisional credits is a discretionary, emergency mechanism which will only be awarded if certain conditions occur and the Department, with the approval of the Governor, determines such gain time should be awarded. The award to Petitioner of such gain time was only through an

erroneous interpretation of the statute by the Department of Corrections. This error was subsequently corrected by an opinion of the Florida Attorney General which was later affirmed by the legislature in an amendment to the provisional credit statute. This amendment resulted in the correction of Petitioner's release date. The amendment did not increase Petitioner's sentence; it merely restored the status quo as it existed at the time he committed his crime and was sentenced.

Although this overcrowding mechanism is distinguishable from the gain time discussed in *Weaver v. Graham,* the amici states would ask this Court to revisit *Weaver* and its progeny. The purpose and effect of the gain time statutes at issue in these cases should be considered with deference given to the right of the states to manage and control their criminal justice systems and prisons. The states have a legitimate penological interest in amending their gain time statutes where they do not reflect the legislative intent and result in release of violent prisoners whose early release threatens the safety of the citizens of these states. Accordingly, the amici states would ask this court to adopt a test which recognizes the deference given to states in such matters and looks to the purpose as well as the effect of the statute.

ARGUMENT

This case involves amendments to a remedial statute which was adopted by the legislature to provide the Department of Corrections with an emergency mechanism which could be utilized by the Department, with the approval of the Governor, to reduce prison overcrowding in times when the other mechanisms were unsuccessful in reducing the prison population to the federally mandated level. Petitioner challenges this statute as violative of the *ex post facto* clause. The amici states would submit that the Florida provision does not alter the definition of criminal conduct or increase the penalty by which a crime is punishable so as to violate the *ex post facto* clause. The provisional credit statute is a remedial statute

aimed at controlling prison overcrowding and the award of such credits in no sense is tied to any aspect of the original sentence and cannot possibly be a factor at sentencing or in deciding to enter a plea bargain. The statute creates only the most speculative and attenuated risk of increasing the measure of punishment attached to the covered crimes.

In the instant case, the issue concerns a statute which neither makes criminal that which was previously innocent nor takes away defenses which a criminal defendant had available at the time he committed his crime. The issue here is whether this prison overcrowding statute, intended merely by the state as a discretionary, emergency mechanism to relieve prison overcrowding, should be viewed as a penal statute merely because of the incidental effect it may have on some inmates and their subjective interpretation of the statute.

The Florida Supreme Court discussed the purpose of this provisional credit statute as follows:

> [T]he state's unilateral decision to restrict the "provisional credit" does not trigger the constitutional issues that would be present if some other forms of credits or gain time were at stake. The reason is that provisional credits are not a reasonably quantifiable expectation at the time an inmate is sentenced. Rather, provisional credits are an inherently arbitrary and unpredictable possibility that is awarded based solely on the happenstance of prison overcrowding. Thus, provisional credits in no sense are tied to any aspect of the original sentence and cannot possibly be a factor at sentencing or in deciding to enter a plea bargain.

Griffin v. Singletary, 638 So.2d at 500 (Fla. 1994).

In *Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990), this Court reviewed the history of the *ex post facto* clause, noting that:

> Although the Latin phrase "*ex post facto*" literally encompasses any law passed "after the fact," it has long been recognized by this Court that the constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them. *Calder v. Bull*, 3 Dall. 386, 390–392, 1 L.Ed. 648 (1798) (opinion of Chase, J.); id., at 396 (opinion of Paterson, J.); id. , at 400 (opinion of Iredell, J.). *See Miller v. Florida*, 482 U.S. 423, 430, 107 S.Ct. 2446, 2451, 96 L.Ed.2d 351 (1987). (FN2) As early opinions in this Court explained, "ex post facto law" was a term of art with an established meaning at the time of the framing of the Constitution. Calder, 3 Dall., at 391 (opinion of Chase, J.); id., at 396 (opinion of Paterson, J.). Justice Chase's now familiar opinion in Calder expanded those legislative Acts which in his view implicated the core concern of the *Ex Post Facto* Clause:
>
> > "1st. Every law that makes an action done *before the* passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives *less*, or different, testimony than the law required at the time of the commission of the offense, *in order to*

> *convict the offender.*" Id., at 390 (emphasis in original).

Collins, 110 S.Ct. at 2718.

This Court noted that the principles of *ex post facto* are so well established that in *Beazell v. Ohio*, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925), the Court was able to confidently summarize the meaning of the Clause as follows:

> "It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*."

Id., at 169–170, 46 S.Ct. at 68.

Applying these holdings to the instant case, it is clear that the statute in question does not violate the *ex post facto* clause. The statute does not make criminal that which was previously an innocent act, it does not take away any defense previously available to the inmate, and it does not make more burdensome the punishment for the crime. At the time of the inmate's offense, he has no expectation of or right to any provisional credits. The granting of provisional credits is not tied to any aspect of his sentence and may only be granted at some time in the future at the discretion of the Department and Governor if various factors occur. Not only is there no expectation but there is no increase of the sentence. If such credits are granted during the inmate's course of incarceration and then taken away, the sentence is not increased, it merely restores the status quo.

Petitioner argues that this remedial statute is an ex post facto violation because it "disadvantages" or "alters to the detriment" the sentence of the inmate. Petitioner cites a line of cases, including *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981),[1] in support of his analysis. However, the Supreme Court has rejected such arguments. Last year, in *California Department of Corrections v. Morales*, 514 U.S. ___, 131 L.Ed.2d 588, 115 S.Ct. 1597 (1995), this Court reviewed an *ex post facto* challenge to a California statute and noted:

> Our opinions in *Lindsey*, *Weaver*, and *Miller* suggested that enhancements to the measure of criminal punishment fall within the *ex post facto* prohibition because they operate to the "disadvantage" of covered offenders. See *Lindsey*, 301 U.S. at 401, 81 L.Ed. 1182, 57 S.Ct. 797; *Weaver*, 450 U.S. at 29, 67 L.Ed.2d 17, 101 S.Ct. 960; *Miller*, 482 U.S. at 433, 96 L.Ed.2d 351, 107 S.Ct. 2446. But that language was unnecessary to the results in those cases and is inconsistent with the framework developed in *Collins v. Youngblood* , 497 U.S. 37, 41, 111 L.Ed. 2d 30, 110 S.Ct. 2715 (1990). After *Collins*, the focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of "disadvantage," nor, as the dissent, seems to suggest, on whether an amendment affects a prisoner's "opportunity to take advantage of provisions

1 *Weaver* is distinguishable from the instant case because it involved a mandatory early release formula which was awarded upon the inmates commitment to the Department of Corrections. The provisional credit provision is an emergency remedial statute which grants the Department of Corrections, with the approval of the Governor, a mechanism to reduce prison overcrowding when the other mechanisms have failed to reduce the prison population to an acceptable level.

> for early release," see post, at ___, 131 L.Ed. 2d, at 602, but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable.

Id. at 131 L.Ed.2d at 595 (FN3).

The amendment to Florida's provisional credit statute does not alter the definition of criminal conduct, nor does it increase the penalty by which a crime is punishable. It merely makes certain classes of violent inmates ineligible for this credit if awarded to reduce prison overcrowding. Although Petitioner argues that his sentence was increased, the amendment did not increase the penalty attached to the crime when committed, it merely restored the status quo for these violent inmates.

The *Morales* Court distinguishes the holding in *Lindsey* and *Weaver,* noting that the statutes at issue in those cases had the *purpose* and *effect* of enhancing available prison terms, whereas "the evident focus of the California amendment in Morales was merely 'to relieve the [Board] from the costly and time-consuming responsibility of scheduling parole hearings' for prisoners who have no reasonable chance of being released." Id. at 131 L.Ed.2d at 596. (Emphasis added) (Citations omitted) This Court stated that "[g]iven these circumstances, we conclude that the California legislation at issue creates only the most speculative and attenuated risk of increasing the measure of punishment attached to the covered crimes." Id. at 131 L.Ed.2d at 599.

Petitioner wants this Court to focus merely on the ultimate effect of the statute without consideration of the purpose and mechanism of the statute. The amici states would ask this Court to follow the purpose and effect analysis set forth in *Morales* in considering whether this statute should be viewed as penal. Such a position is consistent with the long history

of the Court's consideration of the *Ex Post Facto* Clause as illustrated by the following cases.

In *De Veau v. Braisted* 363 U.S. 144, 80 S.Ct. 1146, 4 L.Ed.2d 1109 (1960), the Court upheld, against bill of attainder and ex post facto challenges, a law forbidding certain unions employing former felons from collecting dues. In effect, the law barred convicted felons from working on the New York and New Jersey waterfront. In so holding, the Court noted: "[t]he question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession." Id. At 160. (Emphasis added)

"The proof is overwhelming, " the Court continued, "that New York sought not to punish ex-felons, but to devise what was felt to be a much-needed scheme of regulation of the waterfront, and for the effectuation of that scheme it became important whether individuals had previously been convicted of a felony." Id.

Twenty years later, in *United States v. Halper*, 490 U.S. 435, 109 S.Ct 1892, 104 L.Ed.2d 487 (1989), this Court again considered the issue of punishment in the context of Double Jeopardy, and held:

> To that end, the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.

These goals are familiar. We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. See, e.g., *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168, 83 S.Ct. 554, 567, 9 L.Ed.2d 644 (1963) (these are the "traditional aims of punishment"). Furthermore, "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives." *Bell v. Wolfish*, 441 U.S. 520, 539, n.20, 99 S.Ct. 1861, 1874, n.20 (1979). From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term. We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

Id. at 109 S.Ct. at 1902.

Petitioner argues that Florida's provisional credit statute creates an *ex post facto* violation because it disadvantages Petitioner or "alters to the detriment" his sentence. This theory of disadvantage at one time was adopted in *Kring v. Missouri*, 107 U.S. 221, 2 S.Ct. 443, 27 L. Ed. 506 (1883). However, this Court rejected Petitioner's theory in *Collins v. Youngblood*, ___ U.S. ___, 110 S.Ct. 2715 (1990), and clarified the concept of punishment. The Court stated:

> This analysis is consistent with the Beazell framework. A law that abolishes an affirmative defense of justification or excuse contravenes Art. I. § 10, because it expands the scope

of a criminal prohibition after the act is done. It appears, therefore, that Justice Washington's reference to laws "relat[ing] to the offense or its consequences" was simply shorthand for legal changes altering the definition of an offense or increasing a punishment. His jury charge should not be read to mean that the Constitution prohibits retrospective laws, other than those encompassed by the Calder categories, which "alte[r] the situation of a party to his disadvantage." Nothing in the *Hall* case supports the broad construction of the ex post facto provision given by the Court in *Kring*.

It is possible to reconcile *Kring* with the numerous cases which have held that "procedural" changes do not result in ex post facto violations by saying that the change in Missouri law did take away a "defense" available to the defendant under the old procedure. But this use of the word "defense" carries a meaning quite different from that which appears in the quoted language from Beazell, where the term was linked to the prohibition on alterations on "the legal definition of the offense" or "the nature or amount of the punishment imposed for its commission." The "defense available to Kring under earlier Missouri law was not one related to the definition of the crime, but was based on the law regulating the effect of guilty pleas. Missouri had not changed any of the elements of the crime of murder, or the matters which might be pleaded as an excuse or justification for the conduct underlying such a charge; it had changed its law respecting the effect of a guilty plea to a lesser included offense. The holding in *Kring* can only be justified if the *Ex Post Facto* Clause is thought to include not merely the *Calder* cate-

> gories but any change which "alters the situation of a party to his disadvantage." We think such a reading of the Clause departs from the meaning of the Clause as it was understood at the time of the adoption of the Constitution, and is not supported by later cases. We accordingly overrule *Kring*.

Id. At 497 U.S. at 49. Petitioner's argument is no longer viable and should be rejected by this court. The relevant issue is whether the amendment increases the punishment attached to the crime at the time Petitioner committed his crime. Although Petitioner was subsequently granted provisional credits during his incarceration and these credits were later taken away as a result of the amendment, Petitioner's sentence cannot be said to be increased. The sentence imposed was not made greater; the amendment merely restored the status quo as it was at the time the crime was committed.

Morales concludes a series of cases which have upheld the initial concept of the *ex post facto clause*. In *Morales*, the Court considered a statute which provided a change for inmates in the frequency with which they would be provided with parole hearings. The Court held that this amendment created only the "most speculative and attenuated possibility of increasing the measure of punishment for covered crimes" and therefore was not of the degree necessary to violate the *ex post facto* clause.

The amici states would urge the Court to uphold this concept of punishment which looks at the purpose and effect of the statute, while at the same time upholding the right this Court has reserved to the states to manage and control the criminal justice system and prisons within their states. As this Court noted recently in *Lewis v. Casey*, ___ U.S. ___, 116 S.Ct. 2174 (1996), a case involving an inmate's constitutional right of access to courts:

> The District Court made much of the fact that lock down prisoners routinely experience delays in receiving legal materials or legal assistance, some as long as 16 days, but so long as they are the product of prison regulations reasonably related to legitimate penological interests, such delays are not of constitutional significance, even where they result in actual injury (which, of course, the District Court did not find here).
>
> Second, the injunction imposed by the District Court was inordinately—indeed, wildly—intrusive. There is no need to belabor this point. One need only read the order, to appreciate that it is the ne plus ultra of what our opinion have lamented as a court's "in the name of the Constitution, becom[ing]...enmeshed in the minutiae of prison operations."
>
> Finally, the order was developed through a process that failed to give adequate consideration to the views of state prison authorities. We have said that "[t]he strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors...also require giving the States the first opportunity to correct errors made in the internal administration of their prisons.

Lewis at 2185.

This Court has long upheld the deference which must be given the states in control of its prisons. See *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254 (1987) and *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861 (1979). Courts have "accorded wide-ranging deference [to prison administrators] in the adoption and execution of policies and practices that in their judgment

are needed to preserve internal order and discipline and to maintain institutional security." *Bell*, 441 U. S. at 547. Such deference is especially appropriate with respect to the primary state interest of peace and security within the prison facility. *Pell v. Procunier*, 417 U.S. 817, 94 S. Ct. 2800 (1974). The justification for this deference include the complexity of prison management, the fact that responsibility therefore is necessarily vested in prison officials, and the fact that courts are ill-equipped to deal with such problems. *Procunier v. Martinez*, 416 U.S. 396, 94 S.Ct. 1800 (1974). In *Bell v. Wolfish*, the Court again spoke of the "wide-ranging deference" to be accorded the judgment of prison officials when dealing with security concerns:

> Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response of these considerations, courts should ordinarily defer to their expert judgment.

Bell, 441 U.S. at 547–48 (quoting *Pell*, 417 U.S. at 827).

It is this deference which we now ask this Court to uphold in this area of prison overcrowding—an issue of critical importance to the amici states. Prison overcrowding has been a major problem throughout the states for the last decade and has brought about protracted litigation, great expense, and concern to the states. The states have adopted various mechanisms to control this overcrowding at additional cost and an increased threat to the safety of citizens in these states. On a number of occasions, these mechanisms, adopted to relieve the prison overcrowding, have resulted in the loss of innocent life at the hands of dangerous criminals released too early through these mechanisms. It is with these grave concerns that the amici states urge this court to uphold the test which will focus on both the purpose and the effect, while

giving deference to the penological interests articulated by the states.

As the Court noted in *Morales*, the essence of ex post facto is that the person is put on notice before he is punished. Where the statute is remedial and where the sting of punishment is so speculative and remote, it cannot be said to be punishment or that the inmate has a reasonable expectation of such incidental benefit. The provisional credit provision at issue in this case is an emergency mechanism enacted strictly to be used by state prison officials when and to the extent necessary to relieve prison overcrowding. It was not a mandatory provision such as the gain time provisions seen in *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981),[2] nor was it automatically part of the sentencing formula calculated upon entry into the Department of Corrections. It was strictly an emergency mechanism to be used at the discretion of the prison officials. The inmate had no expectation of such credits upon entry into the system and any benefit or disadvantage can only be seen as incidental to the emergency of prison overcrowding at which the statute was aimed.

Although the provisional credit statute was initially mistakenly applied by the Department of Corrections to various classes of inmates on some occasions, this mistake was soon brought to the attention of the Florida Attorney General

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2 *Weaver* does not address the issue of deference. The amici states would urge this court to revisit *Weaver* and the related cases in light of this deference issue. Many of these early release mechanisms have resulted in serious crimes being committed by violent inmates being released too early. Unfortunately, by the time such problems have been brought to the attention of the state legislators, the courts have invalidated amendments to correct such deficiencies as violative of the *ex post facto* clause. Such results have failed to address the states interest in correcting such statutory deficiencies in light of a legitimate penological interest. The amici states would urge this Court to revisit these cases viewed in terms of the exercise of a legitimate penological interest.

upon notification of the impending release of some of the more violent inmates to which the legislature had not intended such credits to apply. Upon receipt of notification, the Attorney General corrected the error and subsequent remedial legislation was adopted to correct this statute. This action goes to the very essence of the state's authority to control its prison overcrowding while at the same time protecting the safety of its citizens. It is the exercise of the state's powers in response to a legitimate penological interest. To hold otherwise would allow the inmate to create a liberty interest through subjective intent while ignoring the purpose and effect of the statute. It would also allow the inmate to raise this constitutional provision to a higher level than any other constitutional provision while other provisions must yield to legitimate penological interests of the state. To allow the inmate to create a liberty interest through such a speculative remedial statute, merely because some incidental disadvantage may subsequently attach, is inconsistent with this Court's holding in *Morales* and the history of the ex post facto clause.

CONCLUSION

For the foregoing reasons, the decision of the Eleventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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